

Tennessee Ethics Commission
September 23, 2008

The Tennessee Ethics Commission met at 8:30 on September 23, 2008 in Hearing Room 29 of the Legislative Plaza in Nashville, Tennessee. Present were Commissioners Donald J. Hall, Thomas J. Garland, Linda Whitlow Knight, Dianne Ferrell Neal and Benjamin S. Purser, Jr. Chairman Hall called the meeting to order at 8:30 a.m.

Chairman Hall called for approval and discussion of the minutes. Commissioner Purser moved to adopt the minutes as drafted and Chairman Hall seconded. After discussion and suggested corrections were made, the minutes were approved 5-0.

Commissioner R. Larry Brown joined the meeting.

Chairman Hall stated his understanding of the practice that has developed on working with the agenda. He proposed, as Chair, that the Commission proceed and follow through with the agenda as it appeared. He stated that the Commission could review item 6, Setting Meeting Agendas, at that time or defer until that item was reached on the agenda. Discussion of the agenda followed the Chair's remarks. Commissioner Neal made a motion that for today's meeting, the agenda be changed to reflect in the following order to conform to a more businesslike arrangement: Old Business – Item 1 (assessment show causes) and Item 3 (disclosure statements); New Business – Item 8 (employer show causes), Item 9 (lobbyist show cause), Item 11 (amended lobbying rules), Item 12 (TSAC informal response), Item 14 (late filing penalty rules), Item 19 (remedies for failure to file), followed by Item 5 (Election of new Chair), Item 6 (setting meeting agendas), Item 10 (operating procedures), Item 17 (random lobbyist audits), Item 7 (executive director's report), and Item 18 (request for paralegal position). She stated that for reasons she would discuss later, she did not believe the election of an audit committee should occur today. Item 13 had been withdrawn. Commissioner Knight seconded the motion. Voting aye were Commissioners Neal, Knight and Brown; voting nay were Commissioners Hall, Garland and Purser. The motion failed and Chairman Hall stated that the Commission would proceed by covering the agenda by the order in which it appeared in the Commission book. Commissioner Neal made the motion that for future meetings, the financial report be moved on the agenda to follow the call to order and approval of the minutes. There was a second to the motion (inaudible). The motion carried unanimously.

Old Business

Item 1 – Assessment Show Causes

Charlie Cox: Mail was returned marked “unclaimed” after two delivery attempts; first class mailing was not returned. Recommended penalty was \$750.00.

Commissioner Knight asked if the Commission first needed to discuss the underlying issue of whether unclaimed certified mail should be treated as having been received. Chairman Hall agreed. After a statement from the General Counsel, Commissioner Knight made the motion that notices or correspondence that is returned as certified mail unclaimed with no other indication

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shall be treated as having been delivered. Commissioner Purser seconded. The motion carried unanimously.

The Commission returned to the assessment show cause of Mr. Cox. Commissioner Knight made the motion that since his notice was returned unclaimed with no indication that he is not at the address to which the certified mail was sent, that Mr. Cox be deemed to have received his notice and that a \$750.00 fine be imposed. Commissioner Purser seconded and the motion passed unanimously.

Dean Lay: Mr. Lay's notice was sent to a post office box which he had used on his 2007 statement. That notice was returned as not deliverable. Commission staff discovered another post office box address for Mr. Lay and sent a second show cause notice by certified mail. Mr. Lay sent the Commission a letter dated September 16. On September 18, the Ethics Compliance Officer mailed Mr. Lay a blank disclosure statement, but as of September 22, his statement had not been received. Both notices were sent as certified and first class mailings. Mr. Androphy suggested that this issue be deferred until the October meeting to see his many days run and to see if he does file his statement. Chairman Hall made the motion that this matter be deferred until the October meeting. There was a second to the motion (inaudible) and the motion carried unanimously.

Brad Lowery: Mr. Lowery's notice was unclaimed after two delivery attempts; however, he filed his statement on August 6. General Counsel Himmelreich suggested that the Commission use the last date of attempted delivery (7-27-08) to determine the penalty. Commissioner Purser moved that Mr. Lowery be fined \$250.00 and Commissioner Garland seconded. Motion passed unanimously.

Brian Yarber: Mr. Yarber's notice was returned as unclaimed and not deliverable as addressed. The address was the same as Mr. Yarber used on his 2007 filing. General Counsel Himmelreich stated that you only have constructive receipt on returned of certified mail if it is properly addressed and unclaimed. He recommended that this be deferred. Commissioner Knight made the motion to defer this matter and instruct staff to make efforts to locate Mr. Yarber and give him additional notice. Commissioner Purser seconded and the motion passed unanimously.

Item 2 – Election of Audit Committee

Commissioner Neal passed out a memorandum to the Commission which she prepared on this subject. She stated that since three of the current commissioners would not be a part of this Commission after December 31, she believes it is premature to elect an audit committee until the three new commissioners have been appointed. She recommended that there be three members at all times (one of whom shall be the Chair of the Commission), the audit committee would begin only after the completion of an audit by the comptroller's office, and that there be a written charter of the audit committee and the charter should be adopted by the entire Commission. She

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further read a statement from State Audit, Comptroller's Office that stated "The audit committee is an oversight committee of management in the area of handling money and is responsible to have oversight over the risk assessment and the staff code of conduct." She had conversations with a member of the State Audit staff as to the responsibilities of commission members elected to the audit committee in terms of liability. Specifically, she was informed that State Audit would evaluate whether the members of the audit committee were actively fulfilling their responsibilities under the charter. Commissioner Neal made the motion that this item be deferred until the 3 conditions she identified earlier have been met. Commissioner Knight seconded the motion. Commissioner Garland suggested that Commissioner Neal's memorandum be submitted to Art Hayes, Director of State Audit, to see if the recommendations conform to other state agencies. Commissioner Knight made an amendment to the motion that the audit committee have full and direct access to state personnel with which it would be interacting, i.e., that the audit committee would be able to communicate directly with the state and not need someone's permission to do so. Commissioner Neal accepted the amendment. Commissioner Brown offered a correction to a statement made in the memorandum that stated "I regret Don Hall's subsequent report that Commissioner Brown declines to serve on the audit committee because he asserts a lack of financial expertise." Commissioner Brown explained that he does have a fair amount of financial expertise and that the statement dealt with whether the audit committee would actually examine the books of the commission. He stated that he does not consider himself to be an auditor and would not operate in that manner if elected to serve on the audit committee. Commissioner Brown stated that he would be more comfortable if the motion were to defer to not later than a certain time rather than defer indefinitely. He suggested deferring no later than February 2009. Commissioners Neal and Knight accepted this as an amendment and the motion passed unanimously.

Item 3 – Disclosure Statements

Chairman Hall stated that the Commission has before it proposed rules and also a memorandum from Mr. Androphy regarding random audit of disclosure statements and that the Commission would first consider the proposed rules. Mr. Himmelreich stated that late the day before he had received proposed revisions from Commissioner Knight and had not had a chance to review the revisions. Commissioner Purser made the motion that before the October meeting that Commissioner Knight and Mr. Himmelreich work together on the revisions. Chairman Hall seconded the motion. The motion passed unanimously.

The Commission took a 10 minute break.

Upon reconvening after the break, the Commission heard from Tracy O'Neill, lobbyist for the Association of Surgical Technologists. Ms. O'Neill could not be present for the remainder of the afternoon, and presented testimony to the Commission at this time.

The Commission returned to Item 3, the memorandum from Mr. Androphy regarding random audit of disclosure statements. Commissioner Garland stated that at the last meeting he pointed out that in the Ethics Reform Act additional positions in the Attorney General's office had been authorized. He suggested that he would prefer that the General Counsel and the Executive Director talk to someone in the Attorney General's office to see if these positions have been

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filled and if so, could assistance be provided to the Commission staff for in-depth random audit purposes. Commissioner Purser agreed that the workload should be identified before asking for assistance. Commissioner Purser then moved that staff conduct a facial review of all disclosure of interest statements for some state filers (Governor, Governor's Cabinet, Members of the Legislature, Campus Presidents and members of the Ethics Commission). Chairman Hall seconded the motion. Commissioner Brown offered an amendment that the motion track the language of the statute which accurately describes the above-named filers to be included in the review. Amendment was accepted. Commissioner Purser further amended the motion to state that the reviews would begin with the 2009 filings. Amendment was accepted by Chairman Hall. The motion passed 5-0. Commissioner Knight abstained because, while she has no objection to members of the Ethics Commission being included in the review, she does not want members of the public to infer that the Commission thinks that individuals who hold such positions are more likely to file defective disclosures.

New Business

Item 5 – Election of a new Chair

Chairman Hall opened the floor for nominations. Commissioner Purser nominated Commissioner Brown and Commissioner Neal seconded. Commissioner Knight discussed a memorandum she distributed to Commission members that stated her opinion and position that the term rolls over in January and election of a new Chair should occur at that time. The nomination passed unanimously.

The Commission adjourned for lunch and reconvened at 12:20 p.m.

Item 6 – Setting meeting agendas

Commissioner Neal discussed two items: 1) that adequate notice be given to Commissioners of matters placed on the agenda and 2) that if a commissioner makes a reasonable request in a public meeting, courtesy should be given and that matter be placed on the next agenda. Commissioner Brown made the motion that the Commission adopt and continue to practice what has happened in the past, that the Chair have complete control over the agenda and staff draft the agenda for approval of the Chair. Commissioner Purser seconded the motion. After discussion, Commissioner Brown clarified his motion that between meetings, the Chair will decide the agenda. If a request is made during a Commission meeting, the matter will go on the agenda if four Commissioners agree. Motion passed unanimously.

Item 7 – Executive Director's Report

Commissioner Brown questioned what would be the proper process to correct a news article if the information contained therein was not factual. Commissioner Garland made the motion that the Chair or his designee provide an immediate response. Commissioner Brown seconded the motion and the motion passed unanimously.

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Commissioner Neal requested that the draft management risk assessment be included on the next agenda.

Item 8 – Employer show causes (Failure to File Expenditure Report)

Ampharm: Did file upon receiving notice. Recommendation: No good cause - \$450.00. Commissioner Purser moved to accept recommendation; Chairman Hall seconded. Motion passed unanimously.

Association of Surgical Technologists: Earlier in the meeting, the Commission heard testimony by Tracy O'Neill who explained that both the employer and she as the lobbyist misunderstood and were confused regarding the 2008 registration. AST did file upon receiving notice. Commissioner Knight moved to fine AST \$600.00 and to put in the order a finding that the delinquency was not due to the 2008 registration problem, but was a violation of the 2007 registration. Commissioner Purser seconded and the motion passed unanimously. General Counsel Himmelreich later informed the Commission that AST had two mitigating factors and the penalty should be reduced another \$50.00. Commissioner Knight moved to reduce fine to \$550.00 and Chairman Hall seconded. Motion passed unanimously. Finding: no good cause.

Bad Wolf MMA: Did not respond to notice. Staff recommendation: No good cause - \$750.00. Chairman Hall moved to adopt staff recommendation and Commissioner Purser seconded. Motion passed unanimously.

Belew Group: Theo Morrison, lobbyist for Belew Group, appeared before the Commission. Belew Group did not file immediately upon receiving notice, but did file a response to the notice. Staff recommendation: No good cause - \$450.00. Commissioner Purser moved to adopt staff recommendation and Chairman Hall seconded. Motion passed unanimously.

CORE-ECS: Filed immediately upon receiving notice and filed a timely response. Staff recommendation: No good cause - \$400.00. Commissioner Purser moved to adopt staff recommendation and Chairman Hall seconded. Motion passed unanimously.

PCIA: Nathan Ridley, lobbyist for PCIA, attended the Commission meeting, but had to leave before this matter came before the Commission. Mr. Ridley informed Mr. Androphy that the non-filing was not intentional and that PCIA would not be late again. Did file a response. Filing was not as timely as other filings. Staff recommendation: No good cause - \$450.00. Chairman Hall made the motion to adopt the staff recommendation and Commissioner Purser seconded. Motion passed unanimously.

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Item 9: Lobbyist Show Cause (Failure to Register)

Greg Oakley: Employer registered as a lobbyist, but lobbyist did not. Staff had contact with Mr. Oakley and explained that a statement explaining the situation was needed in writing. Mr. Oakley did not provide that statement nor was a statement received from Bad Wolf. Staff recommendation: \$750.00. Commissioner Knight made the motion that there was no basis to find good cause and to fine Mr. Oakley \$750.00. Commissioner Purser seconded. Motion passed unanimously.

Commissioner Knight stated that on the last group – the employers – the findings were no good cause but did not specify that. She made the motion that the Commission confirms that it found no good cause. Chairman Hall seconded and the motion passed unanimously.

Item 10 – Operating Procedures

Commissioner Neal requested that the memorandum prepared by Mr. Androphy be presented at the next meeting so that the Commission could study and address the governance issues more fully.

The Commission adjourned for a break and reconvened at 1:52 p.m.

Item 11 – Amended Lobbying Rules, 0580-1-1

Assistant Counsel Willow Fort explained the reasoning for combining rules that applied to lobbyists and employers, disclosure filers, and complaints. Commissioner Knight stated that the Commission had agreed in the past to have 3 separate rules. General Counsel Himmelreich stated that the Commission voted to adopt the grid in the August meeting and directed staff to incorporate the grid into the rules. After discussion, Chairman Hall moved for the adoption of the amended lobbying rules and Commissioner Purser seconded. Commissioner Knight amended the motion as follows: if there is no good cause and no response on record that the default penalty will be \$750.00; the grid be done in portrait style; and that \$500.00 is the default penalty if there is a response or a filing by the time of the meeting. She also suggested changes to paragraph 2, “there was good cause, and no penalty shall be imposed,” to paragraph 4, “Commission may, but is not required to,” and to the last line “in light of the factors that the Commission determines apply.” Chairman Hall and Commissioner Purser accepted the changes to the motion. Commissioner Brown pointed out that on page 7, Chairman Hall was listed twice and Commissioner Garland was omitted. The motion passed unanimously.

Item 12 – TSAC informal response

General Counsel Himmelreich explained that it was brought to his attention that in June, 2007, an informal opinion was given to TSAC. The question was whether the gift ban applied to employees of TSAC. The previous advice given was that the requestor should make a formal opinion, but that the informal advice given was that the gift ban did not apply. The Comptroller noted that TSAC employees had received gifts (lunches) from an employer of a lobbyist that was

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a contractor with TSAC. The Comptroller noted concern in the audit of TSAC. In a sunset review of TSAC in a Fiscal Review Committee, Senator Doug Jackson mentioned his concern that the Commission had stated that TSAC employees were not subject to the Act and pointed out that there are a number of entities created by state statute and it was his assumption when he voted for the Act that these were covered by the Act. Representative Curtiss said the committee staff should ask the Attorney General for an opinion on this issue and not ask the Commission. Counsel Himmelreich's recommendation was that the Commission should exercise its authority under the Act to review the informal response and at a minimum to advise TSAC and the members of the Fiscal Review Committee that the Commission has reviewed the response and is withdrawing it at the very least. Commissioner Knight moved that the informal opinion be withdrawn and Chairman Hall seconded. Motion passed unanimously. Counsel Himmelreich was directed to draft a statement to Chairman Curtiss.

The Commission discussed opinions that are withdrawn before the final advisory opinion is issued. Commissioner Neal stated that this matter could be taken up under governance at a later time. She wanted it said on record that she thinks that as long as the Commission has adopted a procedure that the draft advisory opinions be posted. Chairman Hall stated this would be an agenda item for next month.

Commissioner Purser stated that as this was the last meeting that Chairman Hall served as Chair that he wanted to take the occasion to thank him for his hard work and dedication and that he was proud to have served with Chairman Hall on the Commission. Commissioner Neal seconded that statement.

The meeting adjourned at 2:55 p.m.